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No. 82-874

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent argues that the issue of relief is an intrinsic aspect of the district court's constitutional ruling, and so is appealable to this Court even in cases where all parties acquiesce in the court's holding that a statute is unconstitutional. She also contends that, even if that is not so, the issue of relief is nonetheless appealable to this Court because of its "impact on federal officials and the programs under their administration" (Br. 20). Tying the right of direct appeal to a challenge to the holding of unconstitutionality, she suggests, will lead to undesirable appellate forum-shopping by the government. Re-

spondent finds support for these contentions in *Regan* v. *Taxation With Representation*, Nos. 81-2338 & 82-134 (May 23, 1983). These contentions are without merit.[1]

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[1] Respondent's counterstatement of the facts (Br. 1-3 & nn. 1-2) conveys the impression that the Secretary, while verbally conceding the unconstitutionality of 42 U.S.C. 411(a)(5)(A), nevertheless continued to apply it in disregard of prior judicial decisions. This is misleading. *Carrasco* v. *Secretary of HEW*, 628 F.2d 624 (1st Cir. 1980), was decided on June 11, 1980. *Becker* v. *Harris*, 493 F. Supp. 991 (E.D. Cal. 1980), was decided on July 17, 1980. On September 30, 1980, the Attorney General formally notified the Speaker of the House and the President of the Senate that the government would not appeal from the decision in *Becker*. 126 Cong. Rec. H10562 (daily ed. Nov. 12, 1980). (We have reproduced a copy of that notice at App., *infra*.) This action was filed three weeks later, on October 20, 1980. On January 16, 1981 the Secretary moved to remand the case to the agency because "[j]udicial precedent has established that 42 U.S.C. § 411(a)(5)(A) * * * is unconstitutional; the Secretary * * * should no longer be enforcing that provision in cases similar to" respondent's (Memorandum in Support of Defendant's Motion to Remand 3). On April 14, 1981 the Secretary instructed local district offices that they were to abide by the decision in *Becker* for all taxable years that included the month of October 1980. (Joint Status Conference Certificate of the Parties' Counsel, Exh. C (filed Dec. 3, 1981)). On April 23, 1981 the government filed an affidavit in this action designed to allay respondent's fears that the Secretary might not voluntarily apply the *Becker* decision to other beneficiaries. It stated that "[t]he Secretary * * * acquiesces in the holding of the Court in *Becker* * * * that 42 U.S.C. § 411(a)(5)(A) is unconstitutional. The Secretary will no longer apply the provisions of [that section]" (Affidavit of Harris G. Factor). These actions all preceded the district court's May 22, 1981 grant of summary judgment on the issue of liability (Pet. App. 3a-4a).

Respondent points to several comments made by the district court as evidence that the Secretary repudiated these un-

1.a. The linchpin of respondent's position is the erroneous assertion (Br. 10-12) that the issue of relief is "an [i]ntrinsic [a]spect of the [c]onstitutional [r]uling" and is therefore reviewable only in this Court under 28 U.S.C. 1252. In fact the issue of relief in a case such as this is neither a constitutional question nor determined in any necessary way by the holding that an act of Congress is invalid. It instead involves considerations of legislative intent and equitable discretion, and accordingly is most properly reviewable in the first instance in the courts of appeals.

It is true that the district court, as a *consequence* of holding a statute unconstitutional, must address the question of relief. But the nature and extent of the remedy in an equal protection case such as this is an issue quite distinct from the constitutional question. It is essentially a matter of discerning what Congress would intend, given the knowledge that its preferred approach could not be employed. For that reason, Congress may itself provide a statutory answer to the question of relief by writing into the law a contingent rule, to be implemented in the event of a holding of unconstitutionality. See Appellant Br. at 43-51, *Heckler* v. *Mathews*, prob. juris. noted, No. 82-1050 (Mar. 21, 1983).[2] Even where Congress does

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equivocal statements of acquiescence (Br. 1, 2 n.2). The comments to which respondent refers (Pet. App. 6a n.2, 13a-15a; Resp. Br. 2 n.2), however, addressed the Secretary's insistence: (i) that the relief granted under the new standard—with which she agreed—should not include amendment of earnings records back to 1950; and (ii) that the class should not be open-ended, so that the Department could apply to nonmembers the same standards used in non-community property states.

[2] We have sent respondents' counsel a copy of our brief and reply brief in *Mathews*.

not adopt that optimal solution, it may give strong indications about the remedial approach it prefers. See *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 11; *Califano* v. *Westcott*, 443 U.S. 76, 90 (1979) ("The presence in the Social Security Act of a strong severability clause * * * evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality.").

That the issue is one of legislative intent rather than constitutional command may also be seen from this Court's treatment of parallel cases where it has held state laws invalid on equal protection grounds. In such cases the Court has consistently held that any number of alternative approaches for remedying the statutory defect are equally permissible, constitutionally speaking.[3] The Court has also made clear that the choice among the various alternatives is one to be made by the state itself, either through its courts or—if it prefers—through new legislation.[4]

Thus, rather than being a "constitutional issue" (Br. 11 & n.8), as respondent contends, the question of relief is instead like problems of statutory construction that the courts of appeals regularly confront under 28 U.S.C. 1291. A court considering the question of relief must ask whether the act specifically

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[3] See, *e.g.*, *Orr* v. *Orr*, 440 U.S. 268, 272 (1979); *Craig* v. *Boren*, 429 U.S. 190, 210 n.24 (1976); *Stanton* v. *Stanton*, 421 U.S. 7, 17-18 (1975); *Skinner* v. *Oklahoma*, 316 U.S. 535, 543 (1942). See also *Welch* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring).

[4] See, *e.g.*, *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 153 (1980); *Orr* v. *Orr*, 440 U.S. at 272; *Craig* v. *Boren*, 429 U.S. at 210 n.24; *Stanton* v. *Stanton*, 421 U.S. at 18; *Skinner* v. *Oklahoma*, 316 U.S. at 543.

addresses the possibility that one portion may be held unconstitutional, and if it does not, how the larger purposes of the act can best be served after one portion is stricken.[5] Those issues may be significant (as are many questions of legislative intent), but they are different from the issue of unconstitutionality. A holding of unconstitutionality necessarily frustrates the will of Congress. But once it is agreed that a specific section cannot stand, the court's choice of remedy may well be consistent with Congress's preferred solution to a conceded defect in the law. And because the remedy chosen may be entirely consistent with what Congress would want, there is no reason to insist on immediate review by this Court in every case. The better solution, and the one adopted in 28 U.S.C. 1252, is to allow review of right in the courts of appeals, and leave open the possibility of discretionary review by this Court pursuant to 28 U.S.C. 1254(1) in the event the remedy finally chosen *does* frustrate Congress's purpose in a matter of some importance.

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[5] This Court has also suggested that where the issue of Congress's intent is quite uncertain, the courts may exercise a degree of equitable discretion in crafting an appropriate remedy. See *Califano* v. *Westcott*, 443 U.S. at 90 ("The District Court ordered extension rather than invalidation by way of remedy here, and equitable considerations surely support its choice"), 93 ("the most equitable extension possible"). Because the issue of congressional intent is, as it were, at one remove, such discretion is both necessary and desirable. But just as it is unnecessary to have review of right in this Court of questions of statutory construction, so too it is hard to justify direct appeals under Section 1252 to determine whether the district court has properly exercised its discretion in fashioning a remedy.

b. Respondent's argument that Section 1252 requires a direct appeal of any issue that somehow depends upon the holding of unconstitutionality would have the unfortunate consequence of enlarging this Court's mandatory docket to include a host of cases that properly belong, at least in the first instance, in the courts of appeals. Whether the plaintiff is entitled to attorney's fees, for example, will depend upon whether his claim of unconstitutionality prevailed, and on whether "the position of the United States was substantially justified." 28 U.S.C. 2412(d)(1)(A). But Section 1252 should not be read to require review by this Court of the award or amount of attorney's fees.[6]

Similarly, the question whether valid portions of a statute are severable is one that must be decided

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[6] In this case the government appealed the district court's November 24, 1982 order awarding attorney's fees to the Ninth Circuit. *Heckler* v. *Edwards*, No. 83-1652 (9th Cir.). Proceedings have been stayed until January 26, 1984, or until shortly after the decision in this case. The government has also docketed an appeal in *Donovan* v. *Blitz*, No. 83-2027 (D.C. Cir.), challenging an award of attorney's fees in a case where the district court had earlier ruled that the Daniel Amendment was unconstitutional. 538 F. Supp. 1119 (D.D.C. 1982), vacated and remanded with instructions to dismiss as moot, No. 82-611 (Jan. 10, 1983).

We note that such nonconstitutional issues as the award or appropriate amount of attorney's fees might be difficult for this Court to dispose of summarily. For unlike all other appeals to this Court, appeals under 28 U.S.C. 1252 would come from a single trial level judge (contrast 28 U.S.C. 1253, 1254(2), 1257(1), (2)) whose conclusions would have been subjected to no scrutiny at the same or any other level of the judiciary. Fairness to the parties in those circumstances might require more thorough consideration than is necessary in other cases within the Court's mandatory jurisdiction.

after part of the act has been held unconstitutional. That issue may occur with some frequency in the wake of this Court's decision in *INS* v. *Chadha*, *supra*. As we explain below (note 16), severability is simply a question of congressional intent, and a district court's decision on that issue—unlike its holding of unconstitutionality—may be entirely consistent with the wishes of Congress. Nevertheless, a rule requiring direct appeal under 28 U.S.C. 1252 whenever the holding of unconstitutionality is a " 'predicate to the relief' " (Resp. Br. 11) would entail immediate review in this Court even in cases where respect for the actions of a coordinate branch of government would not demand it.

Still a third example, similar in many ways to this case, is suggested by *Wright* v. *Califano*, 603 F.2d 666 (7th Cir. 1979), cert. denied, 447 U.S. 911 (1980). There the question was whether the district court properly awarded retroactive monetary relief to plaintiffs claiming husband's insurance benefits under Section 202(c) of the Social Security Act (42 U.S.C. 402(c)), which the government acknowledged was unconstitutional. Not only did the government appeal that question to the court of appeals, but shortly after the appeal was docketed Congress actually repealed the invalid statute (though it did not resolve the question of retroactive relief). Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509 *et seq.* Under respondent's interpretation of 28 U.S.C. 1252, the government would apparently have been required to appeal the issue of relief to this Court even if the statute had been repealed before the appeal was taken.

Indeed, respondent's argument that relief is an "intrinsic aspect" of the holding of unconstitutional-

ity (Br. 10) would require a direct appeal even by a plaintiff who prevailed on the constitutional issue and who therefore *could not* litigate it on appeal. Suppose, for example, that respondent had brought this suit as an individual action and that the district court—after holding Section 211(a)(5)(A) unconstitutional—had recomputed her earnings and held that she was entitled to receive $200 per month. Under respondent's theory that relief is intrinsically part of the constitutional issue, she would be entitled to take to this Court a claim that she was instead entitled to $205 per month. On that appeal she could not present as an issue the constitutionality of the statute, having prevailed on it below. It is hard to believe that Congress intended to require that this Court resolve the only remaining issue in dispute.

2. Respondent also argues (Br. 19-20) that even if the issue of relief is not a part of the constitutional question, direct appeal under 28 U.S.C. 1252 is still proper because Congress was concerned with the "broader problem [of] * * * the impact on federal officials and the programs under their administration." [7] It is unlikely, however, that Congress intended the right of direct appeal to turn on something as indefinite as a decision's "impact" on federal officials and programs where there is no live issue of constitutionality. Congress has not, for ex-

[7] Respondent's brief does not make clear whether this "impact" theory is intended as an alternative to the "intrinsic aspect" theory, or whether it is designed to explain why the "intrinsic aspect" theory makes sense. The discussion at Resp. Br. 19-20 suggests the former, and our treatment of it here assumes that that is so. What we say about it, however, demonstrates as well that the "impact" of relief is a fact too subjective and variable to support respondent's first argument either.

ample, expressed any similar intent for cases involving important issues of statutory construction that may have at least as great an impact on the implementation of the Social Security Act as the decision here. See, *e.g.*, *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983) (use of medical-vocational guidelines to determine a claimant's right to disability benefits); *Califano* v. *Yamasaki*, 442 U.S. 682 (1979) (right to oral hearing before recoupment of overpayments); *Heckler* v. *Day*, cert. granted, No. 82-1371 (Apr. 25, 1983) (time limits for administrative adjudication of disability claims).

Moreover, as we noted above (page 5), there is a clear difference between the impact of a holding of unconstitutionality, and the impact of choosing *X* rather than *Y* as a remedy for a conceded defect in a statute. The former decision necessarily frustrates the will of Congress expressed in the terms of the act. The latter choice, by contrast, may be precisely the one Congress would prefer, given the uncontested predicate of invalidity.

In any event, the very impracticality of an "impact" test for determining appellate jurisdiction shows the unlikelihood that Congress incorporated such a notion into Section 1252. Respondent concedes, for example (Br. 17), that the issue in *Montana Contractors' Ass'n* v. *Kreps*, 442 U.S. 935 (1979), could only be appealed under 28 U.S.C. 1291. The question there was whether the district court erred in not permitting the plaintiffs to seek damages against the federal and local officials responsible for administering the provision held to be unconstitutional. 78-1546 J.S. 4, 9-13, 12a (1978 Term). But whether an award of damages against those who administer a law has a lesser "impact on federal officials and * * * programs" (Resp.

Br. 20) than an order about how such officials should administer the law in future cases is not easily determined. In large part the answer may turn not on the legal or equitable nature of the relief but on the size of the plaintiff class.[8] Thus, if respondent had brought this action simply as an individual, an appeal contesting the relief awarded her would have been a matter of relative insignificance. Had the class certified included only those similarly situated in the State of California, federal courts elsewhere may have accepted the Secretary's contention that a different remedy was appropriate. In short, the "impact" of the remedy chosen varies in ways completely independent of the holding of unconstitutionality;[9] and allowing

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[8] Respondent argues that the difference between this case and *Montana Contractors' Ass'n* may not be the nature of the relief requested, but the fact that there "the plaintiffs sought to appeal * * * from the decision of the district court on a procedural matter" (Br. 17). But the question of class certification, like the denial of a motion to amend a complaint, may be characterized as "not part of the results of the court's holding that a federal statute [is] unconstitutional" (*ibid.*). As the discussion in text illustrates, however, both may bear directly on the "impact" of a district court's holding of unconstitutionality.

[9] In addition to the size of the plaintiff class and the legal or equitable nature of the relief sought, the "impact" of a remedial decision will depend on the character of the law held unconstitutional. For example, there are cases involving government benefit programs where the relief calls not for increased spending, but for division of a fixed amount among a larger beneficiary class. See *Richardson* v. *Griffin*, 409 U.S. 1069 (1972); *Richardson* v. *Davis*, 409 U.S. 1069 (1972); *Weber* v. *Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972). In other cases, an adverse decision on the constitutional issue may concern only the application of the statute to particular facts, not its validity as a whole. See *Fleming* v. *Rhodes*, 331

the right of direct appeal to turn on a necessarily subjective assessment of the nature of the impact will introduce considerable uncertainty into the question of jurisdiction.

3. Respondent notes that allowing the right of direct appeal to turn on whether the issue of constitutionality is contested will "provide a mechanism for appellate forum-shopping[:] * * * the proper appellate tribunal [will] be determined by decision of the appellant as to what issues should be argued" (Br. 22). But that is hardly a feature that makes 28 U.S.C. 1252 unique among statutes defining this Court's appellate jurisdiction. For example, the right to appeal under 28 U.S.C. 1257(1) and (2) turns on the issues the appellant has "drawn in question" in the highest state court. See *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 650-651 (1942) ("appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so we are without jurisdiction over the appeal"). And where the state court decides both federal and state issues, the losing party may seek review in this Court by contesting the former, but not the latter. *Zorach* v. *Clauson*, 343 U.S. 306, 311 n.7 (1952).

In fact Congress frequently makes the aggrieved party's choice of forum turn on the subject matter of his contention, both on appeal [10] and as an original

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U.S. 100 (1947). The question of relief in the latter case would be a matter of limited importance; in the former case the "impact" would be borne by private individuals rather than by the federal treasury.

[10] See 28 U.S.C. 1295(a) (jurisdiction of the United States Court of Appeals for the Federal Circuit); 12 U.S.C. 1904 note (jurisdiction of the Temporary Emergency Court of Appeals); *Spinetti* v. *Atlantic Richfield Co.*, 522 F.2d 1401

matter.[11] That method of apportioning jurisdiction—far from being objectionable as respondent believes—is a sensible way of dividing the federal judicial workload according to the expertise of the courts, the importance of the issues, the relative need for prompt decision of some questions, and the disproportionate burdens borne by some tribunals.[12]

(Temp. Emer. Ct. App. 1975) (antitrust, contract, and fair trade claims appealable to court of appeals, not TECA); *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179, 185-186 (2d Cir. 1979) (issue jurisdiction of TECA). See also *MTM, Inc.* v. *Baxley*, 420 U.S. 799 (1975) (appeal from three-judge court convened under 28 U.S.C. 1253 must be taken to court of appeals when injunction is denied on the basis of *Younger* v. *Harris*, 401 U.S. 37 (1971)); *Gonzalez* v. *Employees Credit Union*, 419 U.S. 90 (1974) (same, when complaint is dismissed for lack of standing).

[11] See 28 U.S.C. 1333, 1334 (federal, not state, courts to hear admiralty and bankruptcy matters), 1491 (Claims Court to hear contract but not tort actions); 2 U.S.C. 437h (issues of constitutionality of Federal Election Campaign Act to be decided in first instance by court of appeals); 42 U.S.C. 1971(g) (three-judge district court to hear voting rights cases).

[12] Respondent suggests that making the choice of court turn on the issues raised will introduce uncertainty into the question of jurisdiction, since "the propriety of the * * * appeal could not be determined until briefs were filed" (Br. 22 n.17). It is true that the existence of jurisdiction will not be revealed by the notice of appeal to the court of appeals or to this Court. The same is true of notices of appeal under 28 U.S.C. 1254(2) and 1257(1) and (2): they do not disclose whether this Court's jurisdiction has been properly invoked. But that is irrelevant since a notice of appeal calls for no response, and the appellee *can* move to dismiss as soon as the issues are defined. At that point the existence of jurisdiction under 28 U.S.C. 1252 turns on a very simple rule: the appellant cannot appeal the holding of unconstitutionality to the court of appeals, and can only appeal to this Court when it contests that holding.

Respondent's discussion of "forum-shopping" implies that the government will somehow benefit from the ability to choose a more favorable court for presenting its claim on appeal. But unlike the situations to which that description is usually attached, see *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 73-74 (1938), this is not an area where the government can present identical claims to either of two courts in the hope of better treatment. On the contrary, the government must pay a heavy price in order to obtain review in the court of appeals: it must acquiesce in the holding that an act of Congress is unconstitutional. It is difficult to believe that the choice among courts would be a matter of game-playing when one of the two options entails such a sacrifice.

Respondent argues, however, that adoption of the Secretary's intepretation will allow an appellant to secure direct review in this Court "[e]ven if [his] constitutional argument is frivolous or insubstantial" (Br. 21), or worse, even where it has been rejected by this Court on an earlier appeal in the same case (Br. 22-23). This contention is itself frivolous. The solution respondent proposes to avoid the *possibility* that such appeals may be taken to this Court is to *require* that the appellant do so. The construction we have advanced, by contrast, is designed to carry out Congress's intent that this Court not have to review the very kinds of cases respondent describes (Gov't Br. 20-22).

4. Respondent relies on *Regan* v. *Taxation With Representation*, Nos. 81-2338 & 82-134 (May 23, 1983), for the proposition that "a ruling by the district court *upholding* the constitutionality of the challenged statute" is appealable under Section 1252 (Br.

14) (emphasis in original), and draws from this the conclusion that the ruling on relief here is similarly appealable. This Court also summarily affirmed another recent case, not cited by respondent, in which two of the appellants challenged the court of appeals' ruling on severability, but not its holding that the legislative veto provision in the Natural Gas Policy Act was unconstitutional. *Process Gas Consumers Group* v. *Consumers Energy Council of America*, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 & 82-209 (July 6, 1983). These cases are not dispositive of the issue here.[13]

In the first place, insofar as the cross-appeal in *Regan* simply raised an alternative ground for holding the statute unconstitutional, this Court could have considered the issue even if no cross-appeal had been taken. *United States* v. *Raines*, 362 U.S. 17, 27 n.7

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[13] Respondent also finds support for her position in *Califano* v. *Westcott*, *supra*, and *McLucas* v. *DeChamplain*, 421 U.S. 21 (1975). Resp. Br. 12, 15. Neither of those cases is apposite. In *Westcott* the Commissioner's appeal on the issue of relief (No. 78-689) was properly before this Court only because the Secretary had already filed an appeal (No. 78-437) challenging the district court's holding that the statute was unconstitutional. 443 U.S. at 78-79, 83. Section 1252 explicitly provides that "[a] party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court."

Respondent states that "no constitutional issue was before the Court" in *McLucas* (Br. 15). But the district court had held unconstitutional Article 134 of the Uniform Code of Military Justice (421 U.S. at 30-31), the Secretary appealed from that holding (73-1346 J.S. 10-11), and this Court vacated the judgment and directed dismissal of the complaint because it concluded that Article 134 was clearly constitutional (421 U.S. at 32).

(1960).[14] More importantly, however, in both *Regan* and *Process Gas* a separate appeal had been taken from the court of appeals' ruling that the statute was unconstitutional.[15] Thus, except for the fact that both cases came from the court of appeals, those cases were similar to one in which the government appeals from a district court's holding of unconstitutionality, and the plaintiff cross-appeals from the court's failure to award all the relief he requested.[16] Cf. *Selective Serv-*

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[14] The cross-appeal in *Regan* (No. 82-134) did, however, seek relief beyond what was given to the cross-appellant by the court of appeals. The court of appeals had remanded to the district court for further proceedings to determine the appropriate remedy. *Taxation With Representation* v. *Regan*, 676 F.2d 715, 744 (D.C. Cir. 1982). The cross-appellant asked this Court to extend the right to lobby to all charities. 82-134 J.S. 6-9.

[15] The constitutional issue was raised in *Process Gas* by the appeals in Nos. 81-2020 and 81-2171, and in *Regan* by the government's main appeal in No. 81-2338.

[16] The issue of severability presented by the cross-appellants in *Process Gas*, like the issue of relief in this case and *Regan*, is not part of the lower court's constitutional holding, but rather a determination about how Congress would wish the statute to be enforced, given the unconstitutionality of one portion. *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 10-11; *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976); *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924) (severability is a "question of interpretation and of legislative intent. * * * The task * * * [is to] determin[e] the intention of the * * * legislature."). Because that is so, we have argued in *Heckler* v. *Mathews*, *supra*, that Congress may quite properly determine the issue of severability in advance, by including directions in the statute. 82-1050 Br. 43-51. Moreover, as is true with other questions of relief, see page 4, *supra*, this Court has left to the states the decision about severability of partially invalid state laws. *Olsen* v. *Smith*, 195 U.S. 332 (1904); *King* v. *West*

ice System v. *Minnesota Public Interest Research Group, Inc.*, appeals pending, Nos. 83-276 & 83-637 (docketed Aug. 19 & Sept. 30, 1983); *McLucas* v. *DeChamplain*, 421 U.S. 21, 29 n.10 (1975) ("There is no question that our appellate jurisdiction as to the access issue depends entirely on whether an appeal properly lies as to the [constitutional] issue."). Section 1252 explicitly provides that such related non-constitutional issues may be brought to this Court from a district court, once an appeal is taken on the constitutional question. *Regan* and *Process Gas* hold only that the same is true of cross-appeals from the courts of appeals.[17] The latter result, though not nec-

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Virginia, 216 U.S. 92 (1910); cf. *New Orleans* v. *Dukes*, 427 U.S. 297, 302 (1976) (severability is "only a state-law question").

In *EEOC* v. *Allstate Insurance Co.*, No. J82-0186(B) (S.D. Miss. Sept. 9, 1983), the district court held unconstitutional the legislative veto provision in the Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 *et seq.* Concluding that that provision was not severable from the remainder of the Act, the court then found that Reorganization Plan No. 1 did not effectively give the EEOC authority to enforce the Equal Pay Act, and dismissed the EEOC's suit under that Act against Allstate. The Solicitor General, conceding the unconstitutionality of the legislative veto provision, has recently authorized an appeal to the Eleventh Circuit on the question of severability. Because of the confusion caused by respondent's position in this case, the Solicitor General has also authorized the filing of a protective appeal on that issue to this Court under 28 U.S.C. 1252.

[17] This Court in *Regan* found authority for such cross-appeals in the first paragraph of 28 U.S.C. 1252. Slip op. 2-3 n.3 (" '*Any party* may appeal' "). We suggested in our opening brief that the more appropriate source of authority would be the second paragraph, which expressly addresses the question of cross-appeals (Br. 34 n.24). Wherever the authority

essary "to avoid splitting the case" between appellate courts, see R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978), is consistent with the "desire of Congress" that this Court view the constitutional question in the context of "the whole case." *United States* v. *Raines*, 362 U.S. at 27 n.7.

This case, in contrast to *Regan* and *Process Gas*, concerns jurisdiction over a direct appeal, not a cross-appeal, and it raises no issue concerning the constitutionality of a federal statute. Whatever reason might justify Section 1252's grant of ancillary jurisdiction over cross-appeals simply does not exist in such a case.

5. It bears repeating that the issue here is not whether the relief ordered by the district court can be reviewed in this Court. That option is always available by means of certiorari to the court of appeals under 28 U.S.C. 1254(1), which we assume this Court would grant in those cases where the question is substantial enough to warrant further review. The issue is rather whether this Court must immediately accept for plenary consideration the potpourri of nonconstitutional issues that can accompany a holding that an act of Congress is unconstitutional, in cases where neither the government nor any other party contests the latter holding. Many of those nonconstitutional issues will be matters of little consequence; none of them will warrant the immediate and final review by this Court that Congress desired for orders invalidating its legislative efforts. We cannot

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may be found, however, the right of cross-appeal conferred by Section 1252 presupposes that it will be presented to this Court along with the constitutional question, which after all is the reason why direct appeals are permitted in the first place.

believe that 28 U.S.C. 1252 requires such an unwise expenditure of this Court's time and energies.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded to the court of appeals for consideration of the Secretary's appeal. If the Court concludes that the court of appeals did not have jurisdiction of the appeal under 28 U.S.C. 1291, however, the Court should vacate the judgment below and remand to the court of appeals with instructions to remand to the district court for entry of a new judgment from which a direct appeal may be taken to this Court pursuant to 28 U.S.C. 1252.[18]

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1983

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[18] Respondent has suggested that "[v]acating the district court's final judgment [in order to permit the entry of a new judgment from which a direct appeal can be taken] is likely to cause confusion as to the government's obligation to continue paying * * * benefits * * * to the class members" (Br. 24 n.18). That prospect is unlikely, since any new judgment can be entered in precisely the same terms as the original one.

APPENDIX

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530

September 30, 1980

The Honorable Thomas P. O'Neill, Jr.
The Speaker
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I wish to inform the House of Representatives that the Solicitor General has determined that the United States will not appeal the judgment of the district court in *Becker* v. *Harris* (E.D. Cal., Civil No. S-79-248-LKK). In this case, the court held that Section 211(a)(5)(A) of the Social Security Act, 42 U.S.C. 411(a)(5)(A), violates the equal protection requirement of the Fifth Amendment to the Constitution. Section 211(a)(5)(A) provides that all income derived from a trade or business that is classified as "community income" under state community property laws shall be credited to the husband for social security purposes unless "the wife exercises substantially all of the management and control of such trade or business." The result of this provision is that many women who participate in the management of a family-owned business are severely disadvantaged in their ability to earn sufficient quarters of coverage to achieve insured status under the Act.

The Supreme Court has established that a gender-based classification will be upheld only if it is substantially related to the achievement of important

governmental objectives. Other provisions of the Social Security Act have been invalidated in the past for failure to meet this test. See, *e.g.*, *Califano* v. *Westcott*, 443 U.S. 76 (1979); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). After careful consideration, we have concluded that no justification can be advanced for the gender-based classification invalidated in this case that would satisfy this constitutional requirement. Accordingly, an appeal to the Supreme Court would serve no useful purpose.

The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot be advanced to defend the gender-based discrimination at issue.

If the Department can be of further assistance to you in explicating the reasons for our decision or if you or your staff believe it would be helpful to discuss the options that the House of Representatives may wish to pursue, Deputy Solicitor General Kenneth S. Geller will be pleased to discuss the matter further. He can be reached at 633-4037.

Sincerely,

/s/ Benjamin R. Civiletti
BENJAMIN R. CIVILETTI
Attorney General

[A virtually identical letter was sent to Vice President Walter F. Mondale, as President of the Senate]

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